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David C. Wright
Attorney, Chestertown, MD

Stephen Z. Meehan

Joseph B. Tetrault
Attorney, Baltimore, MD

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THE NEW MATH OF SENTENCE CALCULATION AFTER *FIELDS*, *WICKES*, AND *HENDERSON*

by David C. Wright, Stephen Z. Meehan, and Joseph B. Tetrault

I. INTRODUCTION

For a long time the General Assembly has implemented and relied upon the award of diminution credits to prisoners[1] serving sentences in the State's prisons.[2] The function of diminution credits is two-fold: First, to encourage prisoners to maintain good conduct and accept employment at prison jobs. Second, it function to alleviate overcrowding by promoting early release of nonviolent and non-felony drug offenders. Over the last decade the General Assembly has expanded the authority and discretion of the Parole Commission to impose penalties upon the revocation of mandatory supervision release.[3] Further complicating matters, over the same period, the diminution credit scheme itself has undergone several amendments and modifications.[4]

The changes in the law governing the diminution credit scheme resulted in a more complicated sentence calculation for the 5,000 prisoners per year that enter the Maryland state prisons, especially for those prisoners with consecutive, partially consecutive, or overlapping sentences.[5] The changes also impacted the sentences of prisoners already in the State prison system whose terms of confinement were retrospectively effected by legislation or court decisions.

The executive branch's concern over liability compounded by the perceived leniency for the incorrect early release of prisoners further complicated the sentence calculation. The Division of Correction ("DOC") cured the inconsistencies by imposing overly strict interpretations of sentence calculation statutes. In some instances the DOC even engaged in outright unauthorized bookkeeping methods.

The result was a legal war between prisoners and the State waged in and refereed by the Court of Appeals of Maryland. The first battle of that war was waged on behalf of Wayne Hood, Michael Sayko, and Merrill Fields, three prisoners who challenged the DOC's unauthorized disallowance of street time credits awarded by the Maryland Parole Commission and the denial of certain good conduct credits.[6] On writ of certiorari, the court of appeals held that the DOC had misapplied the respective statutes. Consolidated under *Maryland House of Corrections v. Fields*,[7] the decision resulted in the *en mass* release of prisoners who had been imprisoned beyond their correct release dates. Fields, Sayko, and Hood were followed into the fray by Wayne Wickes, who challenged the DOC's application of the 1992 amendments creating a two-tiered good conduct credit system.[8] Reported as *Beshears v. Wickes*,[9] the decision adopted a short-lived interpretation of Article 27, Section 700 of the Maryland Annotated Code which created multiple terms of confinement for calculation purposes. Pursuant to that decision, the DOC *en mass* arrested approximately 50 prisoners who had been released on mandatory supervision, not for violating the terms of that release, but because the State had recalculated and retrospectively

[1] Individuals housed in the State of Maryland Division of Correction ("DOC") prefer to be referred to as "prisoners," implying they are detained against their will, as opposed to "inmates," which they believe implies some consent to or acquiescence in their confinement.

[2] *See* MD. ANN. CODE art. 27, § 700 (Supp. 1998).

[3] *See* MD. ANN. CODE art. 41, § 4-612 (1997).

[4] *See* MD. ANN. CODE art. 27, § 700 (Since 1970 this section has been amended over thirteen times); MD. ANN. CODE art. 41, § 4-511 (1997) (Since its inception this section has been amended at least six times); MD. ANN. CODE art. 41, § 4-612 (Since its inception this section has been amended over five times).

[5] *See* MD. ANN. CODE art. 27, § 700(d)(2)-(3).

[6] *See* Maryland House of Corrections v. Fields, 113 Md. App. 136, 686 A.2d 1103 (1996), *aff'd*, 348 Md. 245, 703 A.2d 167 (1997).

[7] *Id.*

[8] *See* Beshears v. Wickes, 349 Md. 1, 706 A.2d 608 (1998).

[9] *Id.*

revised their release dates. One of those arrested was Vincent Henderson, who was released on a petition for writ of habeas corpus by the Circuit Court for Baltimore City.[10] The State sought certiorari and the court of appeals, in *Secretary, Dep't of Pub. Safety & Correctional Serv. v. Henderson* revised the interpretation of Article 27, section 700 adopted in *Wickes*.[11] The court further held that the retroactive recalculation and re-incarceration of prisoners on mandatory supervision release was improper.[12]

II. RELEVANT CHANGES IN THE LAW PRIOR TO THE 1992 LEGISLATION

Diminution credits for state prisoners in Maryland have existed for decades.[13] However, prisoners released by the accumulation of credits, as opposed to those released by parole, were not under supervision until 1970.[14] Even if a prisoner released on mandatory supervision release committed a new offense, that prisoner's mandatory supervision release could not be revoked. In 1970 the General Assembly amended the statute to provide, "[a]ny person sentenced after July 1, 1970, shall, upon release, be deemed as if released on parole."[15] The amendment further provided the released person was to "remain under the supervision of the State Department of Parole and Probation until the expiration of the maximum term or terms for which he was sentenced."[16]

The statute was amended again in 1989, to permit the Parole Commissioner presiding at a revocation hearing to, "rescind all diminution credits previously earned on the sentence or any portion thereof."[17] Prisoners sentenced after 1970 but before 1989 challenged the retrospective application of the amendment on *ex post facto* grounds.[18] In *Frost v. State*, the court rejected the argument, ruling that "the only logical interpretation of the previous statute that would accomplish its purpose required a loss of diminution credits by operation of law."[19] The 1989 amendment also provided that a person who violated mandatory supervision release ("MSR") may not earn any new credits on the balance of the sentence imposed for violating MSR.[20]

A. The 1992 Changes

By 1992, the General Assembly increased the total possible credit under Article 27, section 700 to 20 days per month.[21] The same amendment allowed certain prisoners to receive ten good conduct credits per month if they had not been convicted of crimes of violence as defined in Article 27, section 643B or drug felony offenses.[22] An uncodified section of the amendment provided for prospective application only to a term of confinement imposed after October 1, 1992.[23] It is the

[10] *See* Secretary, Dep't of Pub. Safety & Correctional Serv. v. Henderson, 351 Md. 438, 718 A.2d 1150 (1998).

[11] *Id.*

[12] *See id.* at 452-53, 718 A.2d at 1157-58.

[13] Dimunition credits are earned by the inmates to reduce the length of their confinement. Md. Ann. Code art. 27, § 700 specifies four types of dimunition credits: Inmates can earn dimunition credits based upon good conduct, "satisfactory performance of work tasks," "satisfactory progress in vocational or other educational or training courses," and "satisfactory progress in specially selected work projects or other programs." *Id.* at § 700(d)-(f) & (h). This paper focuses on good conduct credits, unlike the other credits good conduct credits are deducted "in advance from the inmate's term of confinement, subject to the inmate's future good conduct." *Id.* at § 700(d)(1).

[14] *See* 1970 Md. Laws, ch. 406

[15] *Id.*

[16] *Id.*

[17] 1989 Md. Laws, ch. 307.

[18] *See* Frost v. State, 336 Md. 125, 647 A.2d 106 (1994).

[19] *Id.* at 138, 647 A.2d at 113.

[20] *See* Md. Ann. Code art. 41, § 4-612(f); Prisoners and the DOC are currently litigating whether this prohibition is directed towards the remainder of any mandatory supervision term or extends as well to a new sentence. The DOC takes the view that one must "max out" on the old sentence before any credits can be applied to the maximum expiration date of the new sentence. The prisoners' point of view is that under Article 27, section 700, diminution of confinement credits accrue on the new sentence from the date of commitment to custody of the Commissioner of Correction. Under the *Wickes* regime the prisoners were successful but after Henderson the DOC returned to its prior position in this regard. There are as of yet no reported appellate decisions on these "max to max" cases.

[21] *See* 1992 Md. Laws, ch. 588

[22] As defined in Md. Ann. Code art. 27, § 286 (Supp. 1998)

[23] *See* 1992 Md. Laws, ch. 588, § 2.

latter amendment that spawned the *Fields*, *Wickes*, and *Henderson* cases.[24]

B. The Cases

1. *Fields*

The *Fields* case entailed a consolidated appeal of three separate habeas petitions, each seeking immediate release based upon diminution credits.[25] The court considered the following three issues in *Maryland House of Correction v. Fields*:[26]

1) **Administrative Exhaustion**. In contesting a sentence calculation, was an inmate required to exhaust administrative remedies prior to filing a petition for writ of habeas corpus?[27]

2) **Double good conduct credits**. Is an inmate who is serving both a qualifying and disqualifying sentence entitled to double good conduct credits on the qualifying sentence?[28]

3) **Street time**. Upon the Parole Commission revoking mandatory supervision release and awarding both street time and diminution credits, in calculating the prisoner's resulting obligation to the State, may the DOC deduct the street time from the diminution credits and only apply the remaining diminution credits?[29]

a. Administrative Exhaustion

The DOC has established a lengthy and somewhat complicated administrative hearing process to redress prisoner grievances.[30] This process follows five steps:

1) Mandatory informal resolution,

2) Administrative Remedy Procedure to the warden ("ARP"),

3) Appeal of Administrative Remedy Procedure to the Commissioner of Correction ("AARP"),

4) Inmate Grievance Office ("IGO") complaint before an administrative law judge of the Office of Administrative Hearings, and

[24] The 1992 changes also caused the DOC to ponder whether certain offenses were indeed crimes of violence. In particular, in late 1996 the DOC decided that manslaughter by automobile was a crime of violence and halved the credits of prisoners convicted of that offense. Some of the prisoners were actually awaiting release when the Commissioner of Correction, Richard A. Lanham, Sr., in consultation with the Secretary of Public Safety, Stuart Simms, and Governor Parris Glendening, made the decision to retroactively apply *Wickes*, causing the arrest of those previously released and the retention of those awaiting release. Not surprisingly prisoners sought habeas corpus relief. *See* Sacchet v. Blan, 120 Md. App. 154, 706 A.2d 620 (1998).

[25] *See* Maryland House of Corrections v. Fields, 348 Md. 245, 703 A.2d 167 (1997). While *Fields*, *Sayko*, and *Hood* were consolidated for argument before the Court and opinion by the Court, only *Fields* raised all three issues. *Sayko* raised only the first two issues and *Hood* raised only the third issue. Accordingly, the joint opinion is generally referred to as *Fields*.

[26] *See id.* In *Hood*, *Sayko* and *Wickes*, the prisoner plaintiffs were represented by the Prisoner Rights Information System of Maryland, Inc. (PRISM). In *Fields* and *Henderson*, PRISM attorneys filed *amicus curiae* briefs arguing in the interest of the similarly affected prison population. In both *Fields* and *Henderson*, the *amicus curiae* position carried the day. PRISM is a private legal services corporation designated by the Secretary of the Department of Public Safety and Correctional Services to provide legal services to prisoners in the DOC in certain very limited areas. In addition to assistance with federal civil rights claims resulting from conditions of housing, excessive force, improper medical care, and other similar matters, PRISM's representation extends to state habeas corpus proceedings based upon improper or illegal sentence calculations.

[27] *See id.* at 249, 703 A.2d at 169.

[28] *See id.*

[29] *See id.*

[30] Despite the requirements of Annotated Code of Maryland, Article 41, Section 4-104(h)(2) (1993 & Supp. 1995), the DOC's administrative remedy procedure has never been adopted pursuant to the procedures specified for the adoption of regulations in the Administrative Procedure Act, Md. Code Ann., State Government Article, §10-101 (1995). Instead, it is contained in 28 separate Division of Correction Directives ("DCDs") which total 66 pages and have 14 appendices. DCDs 185-001 through 185-700 (effective April 1, 1993). This requirement was not adopted until 1983, after the decision in *State v. McCray*, 267 Md. 111, 297 A.2d 265 (1972). Moreover, the early versions of the administrative remedy procedure were much simpler than the present one. In 1985 it consisted of a mere five pages. Division of Correction Regulation ("DCR") 185-2 (effective August 5, 1985). Even as late as 1992 the procedure was only ten pages long. DCR 185-2 (effective June 1, 1987). It was not until 1993 that it became the huge, unwieldy procedure discussed in the text.

5) Mandatory review of any favorable decision by the Secretary of Public Safety and Correctional Services.[31]

The administrative decision is appealed on the record to the circuit court.[32] The total time to complete this process may easily exceed six months.[33]

In *Fields*, the DOC contended that the prisoner must first exhaust administrative remedies before seeking habeas corpus relief.[34] Therefore, the DOC argued that the principles of administrative law required exhaustion of administrative remedies and judicial review prior to seeking habeas corpus relief.[35] The DOC argued that Fields was barred because of his alleged procedural missteps.[36]

Fields had pursued his administrative remedies through the IGO.[37] Believing he was long overdue for release, he sought to avoid the delay of the judicial review process and seek habeas corpus relief.[38] The DOC maintained that Fields was barred from seeking habeas corpus relief prior to exhausting the judicial review step, even though section 4-102.1(k) did not address habeas corpus proceedings either expressly or implicitly.[39] Additionally, the DOC argued that since Fields had raised only the award of double good conduct credits in his administrative remedies, and had not raised the street time issue administratively, he was barred from raising the street time issue by way of a habeas corpus proceeding.[40]

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[31] COMAR 12.07.01.03D requires that the prisoner first exhaust the "administrative remedy procedure," before filing a complaint with the IGO. This requires that a prisoner must:

1. File a request for informal resolution of his/her complaint to the staff member involved, pursuant to DCD 185-203.
2. Prison officials have 15 days from the date that they receive the request to respond, pursuant to DCD 185-101, §III.A.1.
3. After receiving the response to the requested informal resolution, the prisoner must file a request for Administrative Remedy (ARP) to the warden, pursuant to DCD 185-402.
4. The institution has five working days from the date it receives the request to "index" the request, pursuant to DCD 185-101, §III.C.3.
5. The warden then has 30 days from the date the request is indexed to respond and may request an additional 10 days, pursuant to DCD 185-101, §III.F.
6. After receiving the warden's response, the prisoner must file an appeal to the Commissioner of Correction (AARP), pursuant to DCD 185-403.
7. The Commissioner's office has five working days from the date it receives the appeal to index the appeal, pursuant to DCD 185-101, §III.H.3.
8. The Commissioner has 20 days from the date an appeal is indexed to respond, pursuant to DCD 185-101, §III.K.

Once the prisoner receives a response from the Commissioner the prisoner is free from the procedural labyrinth which is a prerequisite to filing a complaint with the IGO, and he may then finally file such a complaint. The IGO procedure, however, is not without its obstacles and delays, as it does not provide for an immediate hearing as does the habeas corpus procedure, and it does not provide prisoners with the ancillary litigation tools, which are consistent with procedural due process. The complaint to the IGO is processed as follows:

1. The IGO has 60 days to perform an initial review to determine if the case should be dismissed without a hearing, pursuant to Art. 41, §4-102.1(d)(1997).
2. If the complaint is not dismissed, it is referred to the Office of the Administrative Hearings.
3. A prisoner is not allowed to use prehearing discovery. COMAR 12.07.01.08B.
4. The prisoner is only permitted to call "such witnesses as the [Inmate Grievance] Office or an administrative law judge agrees may have relevant testimony to submit and as may be available at reasonable times." COMAR 12.07.01.08C(2).
5. Although hearings are supposed to be held and decisions issued "promptly," there are not actual limits in which a hearing must be held or a decision issued.
6. If the administrative law judge who conducts the hearing finds the complaint to be meritorious in whole or in part, the decision must be sent to the Secretary of the Department of Public Safety and Correctional Services.
7. The Secretary of the Department of Public Safety and Correctional Services has 15 days to review the decision. MD. ANN. CODE art. 41, § 4-102.1.

[32] *See* MD. RULE 7-201, et seq.

[33] Assuming that the prisoners met all of the applicable deadlines, it may take 85 days for the prisoner's complaint to reach the IGO. Once the prisoner's complaint reaches the IGO, assuming the matter is scheduled before an administrative law judge within 30 days as required, it may take an additional 105 days for the prisoner to receive a final decision from the IGO.

It should also be noted that after the circuitous detours of the administrative process leading to the IGO, and after the IGO process, the prisoner's complaint is returned to the Secretary of the Department against which the prisoner has filed his complaint. The Secretary then has what is effectively veto power over a decision of an administrative law judge that may be in the prisoner's favor.

[34] *See* Fields, 348 Md. at 256, 703 A.2d at 173.

[35] *See id.*

[36] *See id.*

[37] *See id.* at 252, 703 A.2d at 171.

[38] *See id.*

[39] *See id.* at 259-60, 703 A.2d at 174.

[40] *See id.* at 256, 703 A.2d at 173.

The prisoner plaintiffs, in the cases before the court in *Fields,* asserted that the resolution in their favor of the unauthorized taking of street time credits and the failure to award statutorily mandated good conduct credits claims entitle them to immediate release. Therefore a habeas corpus petition was proper.[41] The prisoners relied upon *Earle v. Gunnell*[42] which held that prior to the prisoner filing a 42 U.S.C. § 1983, civil rights action in state court, exhaustion of the remedy provided by the IGO is not required.[43] The *Earle* prisoners relied on former Md. Rule Z41,[44] which provided that any unlawfully confined prisoner may file for habeas corpus relief.[45]

The *Fields* prisoners also put forth *Frost v. State*[46] and *Gluckstern v. Sutton*[47] to support their position. In *Frost*, the appellant had reached the court by way of a habeas corpus proceeding filed as a challenge to the legality of his confinement without first exhausting administrative remedies.[48] In *Gluckstern,* the court affirmed the grant of habeas corpus relief in the case of a prisoner who challenged the retroactive application of statutory requirements for parole from the Patuxent Institution without first exhausting administrative remedies.[49] In both cases the court never addressed the exhaustion question, but rather proceeded to the substantive issues. While no Maryland cases have opined on this specific issue, foreign courts which have addressed the question have ruled that administrative exhaustion is not a prerequisite to habeas corpus relief.[50]

Finally, the *Fields* prisoners argued that the DOC's administrative remedy process was insufficient, if not illusory. The DOC's administrative system is slow, cumbersome, and often leaves prisoners no further relief than when they started. The practical reality is that even when a prisoner reaches the IGO, the prisoner can expect a six month delay before a hearing, that is if the IGO does not dismiss the complaint on procedural grounds thus requiring judicial review on the dismissal prior to any productive review. A system so bogged down is simply inadequate to address challenges to the duration of confinement when the inmate, if successful, is entitled to immediate or near immediate release. The power of the Secretary of the Department of Public Safety to have final review and veto power makes the process illusory.

The court determined that, "the usual legal presumption is that the administrative remedy is primary and must be '"first invoked and followed" before resort to the courts.'"[51] The court also concluded that, generally, prisoners with *any* grievance or complaint against *any* office were required to exhaust administrative remedies before seeking relief under other common law or statutory remedies.[52] However, in the case of prisoners entitled to immediate release challenging illegal confinement, there was no logical bar to habeas corpus proceedings in the administrative scheme.[53] Writing for the *Fields* Court, Judge Chasanow opined:

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[41] *See id.*

[42] 78 Md. App. 648, 554 A.2d 1256 (1989).

[43] *See id.* at 658, 554 A.2d at 1261.

[44] The "Z" rules were repealed prior to the *Fields* decision and are now found at Md. Rule 15-301, et seq.

[45] *See* Earle, 78 Md. App. at 656, 554 A.2d at 1260.

[46] 336 Md. 125, 647 A.2d 106 (1994).

[46] 319 Md. 634, 574 A.2d 898, cert. denied *sub nom. Henneberry v. Sutton*, 498 U.S. 950 (1990).

[48] *See* Frost, 336 Md. at 130-31, 647 A.2d 108-09.

[49] *See* Gluckstern, 319 Md. 634, 574 A.2d 898.

[50] The purpose of habeas corpus is to allow a restrained person "to have a speedy investigation into the cause of his detention and to secure his release that takes at least six months unless he is lawfully detained." Such a purpose is frustrated if an administrative procedure is a prerequisite to habeas corpus relief. Luckie v. State, 502 So.2d 870, 872 (Ala. Crim. App. 1986). The court must balance the interests of judicial economy and administrative efficiency, against the right of the individual to gain his freedom at the earliest possible time through a writ of habeas corpus. If the court finds the balance tipped in favor of the prisoner, a habeas corpus petition will be considered without first exhausting the administrative remedies. Barrows v. Hogan, 379 F. Supp. 314, 316 (M.D. Pa. 1974).

[51] Fields, 348 Md. at 258-59, 703 A.2d at 174 (quoting Md. Reclamation v. Harford Cty. 342 Md. 476, 493, 677 A.2d 567, 576 (1996)).

[52] *See id.* at 259-60, 703 A.2d at 175.

[53] *See id.* at 260, 703 A.2d at 174-75.

If a habeas corpus proceeding, by an inmate asserting an entitlement to immediate release, were nothing more than a common-law or statutory remedy, we would agree with the Division that the inmate would be required first to invoke and exhaust the administrative procedure.

A habeas corpus proceeding, however, is not simply a common-law or statutory remedy over which the General Assembly has full control. Instead, it is a remedy authorized and protected by the Constitution of Maryland. MD. CONST. Art. III, §55 provides that "[t]he General Assembly shall pass no Law suspending the privilege of the Writ of Habeas Corpus." While the legislature may "reasonably" regulate the issuance of the writ, any legislatively imposed regulations must not impair the fundamental right to the substantive remedy of habeas corpus.[54]

b. Double Good Conduct Credits for Post-October 1, 1992 Offenders.

The determination of this issue hinges on the interpretation and application of "term of confinement" as that term is used in the 1992 amendment to Article 27, section 700,[55] which implemented a dual system of good conduct credits for qualifying and disqualifying sentences.[56] Those prisoners serving qualified sentences imposed after 1992 receive double good conduct credits of 10 days per month, while prisoners serving disqualifying sentences received only 5 days per month.[57] All offenders sentenced prior to 1992 received credit at the old rate. Due to the 1992 amendment to Article 27, section 700, the legislature created the possibility that a prisoner could owe an obligation to the State consisting of two separate sentences, one of which was for a qualifying offense for which sentence was imposed after 1992, and one of which was for a disqualifying offense, or a pre-1992 sentence.[58]

The DOC contended that "term of confinement" included the entire obligation to the State and that if any portion of that obligation was for a disqualifying offense or a pre-1992 sentence, the prisoner was disqualified from receiving double good conduct credits on the entire obligation to the State.[59] The prisoners took the position that a period of incarceration consisting of multiple sentences imposed at different times cannot be considered to have been imposed at any single definite point in time and is therefore not a single term of confinement, at least on the good conduct issue.[60] In point of fact, the prisoners contended that with the potential for additional sentences, a term of confinement can never be said to have been fully imposed until it has been fully served.[61]

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[54] *Id.* at 260, 703 A.2d at 174-75 (citing Olewiler v. Brady, 185 Md. 341, 346, 44 A.2d 807, 809 (1945); State v. Glenn, 54 Md. 572 (1880)).

[55] MD. ANN. CODE art. 27, § 700(a).
In this section, "term of confinement" means:
(1) The length of the sentence for a single sentence; or
(2) The period from the first day of the sentence beginning first through the last day of the sentence ending last for:
(i) Concurrent sentences;
(ii) Partially concurrent sentences;
(iii) Consecutive sentences; or
(iv) A combination of concurrent and consecutive sentences.

[56] *See* Fields, 348 Md. at 263, 708 A.2d at 176. Specifically the operative language of MD. ANN. CODE art. 27, § 700(d) stated:
(1) An inmate shall be allowed a deduction in advance from the inmate's term of confinement, subject to the inmate's future good conduct.
(2) For an inmate whose term of confinement includes a consecutive or concurrent sentence for either a crime of violence as defined in Article 27, §643B of the Code or a crime of manufacturing, distributing, dispensing, or possessing a controlled dangerous substance as provided under Article 27, §286 of the Code, this deduction shall be calculated at the rate of 5 days for each calendar month, and on a prorated basis for any portion of a calendar month, from the first day of commitment to the custody of the Commissioner through the last day of the inmate's maximum term of confinement.
(3) For all other inmates, this deduction shall be calculated at the rate of 10 days for each calendar month, and on a prorated basis for any portion of a calendar month, from the first day of commitment to the custody of the Commissioner through the last day of the inmate's maximum term of confinement.

[57] *See* 1997 Md. Laws, ch. 588.

[58] *See* MD. ANN. CODE art. 27, § 700(a).

[59] *See* Fields, 348 Md. at 263, 703 A.2d at 176.

[60] *See id.* at 265-66, 703 A.2d at 177.

[61] *See id.* at 266-67, 703 A.2d at 178.

The court ruled that while the definition of "term of confinement" as set forth in Article 27, section 700, included a prisoner's total obligation to the State, the clarity of that definition does not "'preclud[e] [the court] from looking at the purpose of the statute.'"[62] The court noted that the legislative history behind the implementation of double good conduct credits was to reduce prison overcrowding.[63] Based upon the legislative history, the court concluded that a prisoner's obligation to the State could be comprised of more than one term of confinement with the application of good conduct credits for qualifying nonviolent sentences and disqualifying or pre-1992 sentences as the statute provided.[64] The court explained that

> [t]he effect of this decision is that, for those sentences imposed before October 1, 1992, good conduct credits should be awarded at the old rate of five days per month. Those nonviolent, non-drug related sentences imposed during a new sentencing after October 1, 1992 should carry good conduct credits at the rate of ten per month.[65]

c. Street Time

When a prisoner's time in custody and the prisoner's total diminution credits equals the total sentence and the prisoner has not previously been released on parole, the prisoner is released to mandatory supervision for a period equal to his diminution credits.[66] Upon violation, the prisoner appears before a parole commissioner for a revocation hearing.[67] Where the parole commissioner finds that the prisoner has violated the mandatory supervision release, the prisoner is required to serve the balance of the sentence – time equal to the number of diminution credits used to secure mandatory release.[68] At this point, the parole commissioner has the discretion to reduce the time remaining on the sentence by crediting all or part of the days spent out on supervision[69] and allow the prisoner to retain all, some, or none of the diminution credits the prisoner had earned and used to secure mandatory supervision release.[70]

Notwithstanding the statutory provision, the DOC took the position that street time credit and diminution credits could not both be applied to the balance of the sentence to be served.[71] The DOC's ultimate concern was that in a case where a prisoner was awarded all of the street time and all of the diminution credits, the Parole Commission could effectively terminate any return to custody and return the prisoner to the street.[72] The DOC argued that the institutional commitment offices were required to deduct the street time credit awarded by a parole commissioner from the good conduct credits awarded by the Parole Commissioner and the net result was applied against the balance of the time the prisoner had to serve.[73] The DOC argued that it was not exercising any discretionary authority, but was merely carrying out the Parole Commission's decision and cited its own internal

[62] Fields, 348 Md. at 263, 703 A.2d at 176 (qouting State v. Thompson, 332 Md. 1, 7, 629 A.2d 731, 734 (1993)).

[63] *See id.*

[64] *See id.* at 267-68, 703 A.2d at 178.

[65] *Id.* at 268, 703 A.2d at 178.

[66] *See generally* MD. ANN. CODE art. 41, § 4-612 (1997).

[67] *See* MD. ANN. CODE art. 41, § 4-511(a) (1997).

[68] *See* MD. ANN. CODE art. 41, § 4-511(c).

[69] MD. ANN. CODE art. 41, § 4-511 provides in part: "[I]f the order of parole is revoked, the prisoner shall serve the remainder of the sentence originally imposed unless the Commission member hearing the parole revocation, in the member's discretion, grants credit for time between release on parole and revocation of parole."

[70] MD. ANN. CODE art. 41, § 4-612 (1988) provides in part: "The Parole Commissioner presiding may rescind all diminution credits previously earned on the sentence or any portion thereof in the revocation proceedings."

[68] *See* Fields, 348 Md. at 269, 703 A.2d at 179.

[72] The DOC maintained this position despite the fact that the controlling legislation did not prohibit such a result. Logically, however, such a result would be unlikely in that if the Commissioner sought to achieve such an end result, the means would very likely have been simply a decision not to violate MSR.

[73] *See* Fields, 348 Md. at 268-69, 703 A.2d at 179.

regulations, the Commitment Procedures Manual, as authority for its position.[74] To this day, those regulations have never met the scrutiny of the legislature and are not reliable authority.[75]

The prisoners set forth a three-prong attack on the DOC's form of cipher.[76] First, the Parole Commission was perfectly within its authority to grant sufficient street time and good conduct credits to effectively vacate the balance of the sentence.[77] Second, it is the Parole Commission and not the DOC which has the sole authority to rescind good conduct credits following revocation at mandatory supervision.[78] Third, if street time and good conduct credits are both designed to reduce a prisoner's sentence, it is illogical and illegal to deduct one from the other for sole purpose of making a prisoner serve more time.[79]

The respective DOC's and prisoners' approaches may be demonstrated as follows:

Prisoners' Approach		**DOC's Approach**	
Determining Initial Maximum Expiration Date ("MED"):			
Imposition:	1/1/90	Imposition:	1/1/90
Term:	7 yrs.	Term:	7 yrs.
Current MED:	1/1/97	Current MED:	1/1/97
MSR date:	9/22/94	MSR date:	9/22/94
Returned:	6/25/96	Returned:	6/25/96
Days Out:	641	Days Out:	641
Street Time:	<641>	Street Time:	<641>
	-0-		-0-
Adj. MED:	1/1/97	Adj. MED:	1/1/97
New Imposition:	12/31/96	New Imposition:	12/31/96
Term:	5 yrs.	Term:	5 yrs.
New MED:	12/31/01	New MED:	12/31/01
Determining New Mandatory Supervision Release ("MSR") Date:			
Old GCC:	831	Old GCC:	831
MPC Resc:	<401>	MPC Street:	<641>
GCC Bal:	431	subtotal:	190
		MPC Resc.:	<401>
		Illusory subtotal:	-0-
New GCC:	300	New GCC.:	300
GCC Bal:	731	GCC Bal:	300
MSR Date: 12/31/01 less 731 days =12/30/99		**MSR Date: 12/31/99 less 300 days = 3/6/01**	

After setting forth this dual sentence calculation in their *amicus curiae* brief in *Fields*,[80] the prisoners demonstrate the illogic of the DOC's stance. The confusion of the "illusory subtotal," implies the DOC has an unwritten

[74] *See id.* at 269, 703 A.2d at 179.

[75] Under the DOC's approach, upon retake if a prisoner was awarded a larger amount of street time than good conduct credits, it is possible to be returned to prison with more of an obligation to the State for the same sentence than when the prisoner was released on mandatory supervision.

[76] *See Amicus curiae* brief for PRISM, Fields (No. 125-1996).

[77] *See* Fields, 348 Md. at 271, 706 A.2d at 180.

[78] *See id.*

[79] *See id.* at 269-70, 706 A.2d 179.

[80] *See id.*

rule "which magnanimously requires that the prisoner not be given a negative diminution credit balance which would require the prisoner to serve time to offset that negative balance before he may actually begin serving his sentence."[81] The brief asserts there is a severe flaw in an accounting system which must include in its procedure a built in adjustment to avoid results which are logically dictated to be incorrect.[82] The brief concludes that the mere fact that such an illogical result must be avoided by an exception to the stated procedure is evidence that the procedure itself is defective.[83]

The *amicus* brief further illustrates the effect of the DOC's dubious procedure.[84] The Parole Commission gives "street time" which is accounted for in the adjusted maximum expiration date.[85] The DOC then takes away that "street time" by deducting it from the prisoners diminution credits. It is unclear, as the brief states, the source from which the DOC derives its authority to subtract the "street time" credit from the diminution credits.[86]

The brief notes the Parole Commission derives its authority from two separate statutes enacted by the Maryland General Assembly.[87] Moreover, the brief asserts, the logical intent of those statutes support Parole Commission's position.[88] The DOC's basis of support is its own Commitment Procedures Manual which was adopted without any prior public dissemination or opportunity for public comment and is subject only to the delegable approval authority of the Commissioner of Correction.[89] Further illustrating the illogic of the system, the computer system used is acknowledged by the DOC, "to be incapable of correctly calculating sentences."[90]

The court agreed with the prisoners' position. The DOC's interpretation of street time credits was found to be "especially illogical" in light of the statute.[91] Article 41, section 4-511(d)(1), provides that upon revocation of mandatory supervision release, the prisoner shall serve the remainder of the sentence originally imposed, *unless* the Maryland Parole Commission, in its discretion, grants credit for the time between release on mandatory supervision and revocation of that mandatory supervision.[92] The language of subsection (d)(1) provides that the prisoner must serve the balance of the originally imposed sentence, unless the Parole Commission grants street time credit.[93]

The court concluded that the DOC was without authority to adjust the award of diminution credits given by the Parole Commission.[94] That authority rests solely within the discretion of the Parole Commission.[95] Accordingly, the court concluded that the DOC improperly adjusted prisoner's diminution credits by the amount of street time credit awarded the prisoners by the Parole Commission.[96]

2. *Wickes*

Beshears v. Wickes[97] was the first test case of the DOC's interpretation of *Fields*. *Fields* raised the more general question about the appropriate application of the October 1, 1992 amendment to post-amendment violators with nonviolent offenses. Wayne Wickes challenged the

[81] *Amicus curiae* brief for PRISM at 30, Fields (No. 125-1996).

[82] *See id.*

[83] *See id.*

[84] *See id.*

[85] *See id.*

[86] *See id.*

[87] *See id.*

[88] *See id.*

[89] *See id.*

[90] Id. (quoting Petitioner's (Division's) Brief at n.6, Fields (No. 125-1996).

[91] *See* Fields, 348 Md. at 269, 706 A.2d at 179.

[92] MD. ANN. CODE art. 41, § 4-511.

[93] *See id.* (Subsection (d)(2) creates an exception to that exception which prohibits the Parole Commission from granting street time credit to those prisoners whose mandatory supervision was revoked as a result of violent crime. The Court of Appeals implied that exception to the exception substantiated the statutory authority for use of the exception.)

[94] *See* Fields, 348 Md. at 271, 706 A.2d at 180.

[95] *See id.*

[96] *See id.* at 271-72, 706 A.2d at 180.

[97] 349 Md. 1, 706 A.2d 608 (1998).

DOC's application of the good conduct credit amendment to a prisoner who was serving sentences for both a pre-amendment violent crime and a post-amendment nonviolent crime.[98] Confronted with that factual scenario, the DOC concluded that the pre-amendment sentence for a violent crime tainted the post-amendment sentence for a nonviolent crime for the purposes of awarding double good conduct.[99] Wickes argued that such an interpretation was an incorrect reading of both the statute and the *Fields* decision.[100]

On a petition for habeas corpus, the trial court agreed with Wickes and ordered that the DOC apply good conduct credits at the rate of 10 per month to the sentence for the post-amendment nonviolent crime.[101] The DOC appealed to the Court of Special Appeals of Maryland, but the Court of Appeals of Maryland, *sua sponte*, issued a writ of certiorari to decide the question.[102] The court affirmed the trial court,[103] but included dicta that resulted in the creation of multiple terms of confinement for each individual sentencing event where there was a break in custody from the DOC.

Applying the *Fields* decision to Wickes' case, Judge Chasanow, writing for the court, concluded that "the sentencing of a defendant for a subsequent offense while he is out on mandatory supervision release for a prior offense is a separate sentencing event."[104] As such, the court stated that "Wickes's sentences for the violent offense of rape and the nonviolent offense of third-degree burglary [were] part of two separate sentencing events and, therefore, are to be deemed separate terms of confinement."[105]

As innocuous and possessed of *a priori* logic as that statement may seem, the DOC relied upon this dicta in *Wickes* as a basis to recalculate sentences for those prisoners who were serving or had served partial concurrent, partial consecutive, qualifying and disqualifying sentences.[106] The result was that numerous prisoners were "*Wickes*'ed."[107] This meant the DOC applied *Wickes*

[98] *See* Wickes, 349 Md. at 5, 706 A.2d at 610.

[99] *See id.* at 4, 706 A.2d at 609.

[100] *See id.* at 5, 706 A.2d at 610.

[101] *See id.*

[102] *See id.*

[103] *See id.* at 3, 706 A.2d 609.

[104] *Id.* at 11, 706 A.2d at 613.

[105] *Id.* at 12, 706 A.2d 613.

[106] The operative language, defined by the prisoners as dicta, was not so defined by the DOC or the minority of the Court in *Henderson*, 351 Md. 438, 718 A.2d 1150 (1998). That language was as follows: "Finally, we reiterate our rejection of the Division's argument, posited in *Fields*, that to calculate separate rates for separate terms of confinement being served consecutively 'would be difficult to administer.'" Wickes, 349 Md. at 10, 706 A.2d at 612 (quoting Fields, 348 Md. at 265, 703 A.2d at 177). However, an illustration shows that the calculations are not that complicated.

> An inmate may have two different mandatory release dates just as the inmate may serve concurrent sentences of different lengths. For example, an inmate is serving concurrent overlapping sentences A and B. Sentence A is a ten-year sentence for a crime of violence imposed on January 1, 2000. The inmate is released on mandatory supervision 600 days early (10 years x 5 credits/month x 12 months/year = 600 good conduct credits. While out on mandatory supervision release the inmate receives sentence B, a ten-year sentence for a nonviolent, non-drug related offense imposed on January 1, 2009, which would terminate on January 1, 2019 without the application of any good conduct credits. Because this subsequent offense violates the conditions of the inmate's mandatory release, his mandatory supervision release is revoked and he must now serve the 600 days remaining on sentence A, which he also began serving on January 1, 2009. Thus, the inmate's mandatory release date with respect to sentence A will be August of 2010. Unless the inmate's B sentence is reversed, however, the inmate will not actually be released in August of 2010 because with regard to sentence B, the inmate will not be eligible for mandatory supervision release until September of 2015 (more than 3 years early through the application of good conduct credits at a rate of ten days per month – 10 years x 10 credits/month x 12 months/year = 1200 good-conduct credits). In other words, even though these sentences overlap, the inmate will have two different mandatory release dates. Similarly, if sentence B were for one year, the mandatory supervision release date would be August of 2010, instead of September of 2009. Moreover, as we said in *Fields*, "[w]e should not adopt the Division's theory merely because to do otherwise would saddle the Division with more complex calculations." *Id.* at 10-11, 206 A.2d at 603 (quoting Fields, 348 Md. at 265, 703 A.2d at 177).

[107] At argument before the court of appeals in *Henderson*, upon questioning from the court, counsel for the Secretary indicated very few prisoners were effected, less than 100 prisoners. When asked by the court, counsel for the prisoners reported that the DOC's house counsel

retrospectively to prisoners' sentence calculation and thus moved mandatory release dates further into the future or issued administrative escape retake warrants to return prisoners who, on recalculation, were released too early.[108]

a. History behind *Wickes*

To understand the nuances of the DOC's interpretation of the dicta in *Wickes*, one must participate in a history lesson in sentence calculation and return to the line graphs of our adolescence.[109] Prior to 1990 and the codification of DCIB 9-90 by amendment to the provisions of Article 27, section 700,[110] the DOC operated under a sentence calculation system which provided for cell parole for partially concurrent, partially consecutive "overlapping" sentences. An "overlapping consecutive/concurrent" obligation to the DOC may be graphically illustrated as follows:

advised that 2000 prisoners were effected. Counsel for the Secretary was forced to acknowledge the accuracy of the prisoners' head count.

[108] *See generally* Wickes, 349 Md. 1, 706 A.2d 608. The *Wickes* decision did not reach the issue of street time credit for the time the DOC said these prisoners were wrongfully released. However, logic certainly supports the contention that an erroneous release on mandatory supervision subject to the same terms and conditions as if one were on parole, is in effect a parole, or, at the very least, that such a prisoner is entitled to street time credit for that period during which he was on mandatory supervision release without violation of its condition.

[109] Much of this history and the illustrative graphs are directly from the prisoners' brief in *Henderson*.

[110] DCIB No. 9-90, dated March 9, 1990, SUBJECT: AWARDING DIMINUTION OF CONFINEMENT CREDIT FOR INMATES WITH OVERLAPPING CONCURRENT SENTENCES

1. Secretary Bishop L. Robinson has now received advice by memorandum from Attorney General J. Joseph Curran on the application of diminution credits to overlapping concurrent sentences. Overlapping concurrent sentences are those which:

a. have a starting date which falls between the inmate's then current starting and maximum expiration dates; and

b. cause a new maximum expiration date which falls beyond the current maximum expiration date.

2. Attorney General Curran's memorandum advises that credits earned under Article 27, section 700 between the first day of commitment and the maximum expiration date are to be applied to the maximum expiration date. Section 704A credits, it follows, are to be applied in the same manner. This means that credits ordinarily will not be attributed only to specific sentences, but instead to whole terms of incarceration. Specific circumstances may require exceptions to this, and they will be reviewed and dealt with as they arise.

3. A hypothetical case will illustrate the principles set out in this policy:

If inmate Jones has a three year sentence beginning January 1, 1990, and receives a second three year sentence beginning on January 1, 1991, his maximum expiration date will be January 1, 1994. Good conduct days attributable to the four year term (assuming full good conduct credits, 240 days) will be applied to this maximum expiration date. Additionally, all industrial, educational, and special project credits earned from January 1, 1990 will be applied to this maximum expiration date.

4. This method of applying diminution credits will be implemented immediately by all commitment offices, and will be applied to all new transactions occurring after the date of this DCIB. Additionally, the DOC will, as soon as reasonably possible, recalculate all sentences of this nature which have not been calculated in accordance with the above method. The review of existing sentences will be under the supervision of the commitment supervisor for each institution, who shall:

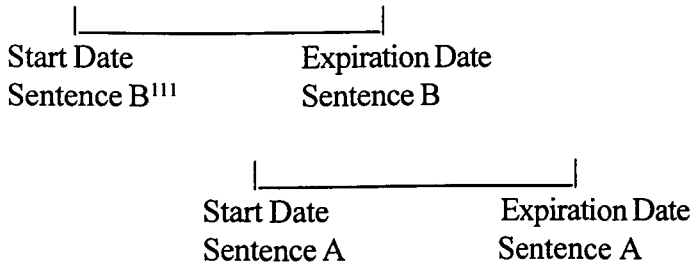
a. ensure that first the sentences of all inmates scheduled for release on mandatory supervision (those in the "short file") are reviewed and recalculated under the policy set out in this DCIB, if necessary;

b. ensure that the sentences of all inmates identified on a computer list generated from OBSCIS and provided by DOC HQ are reviewed and recalculated under this DCIB, if necessary;

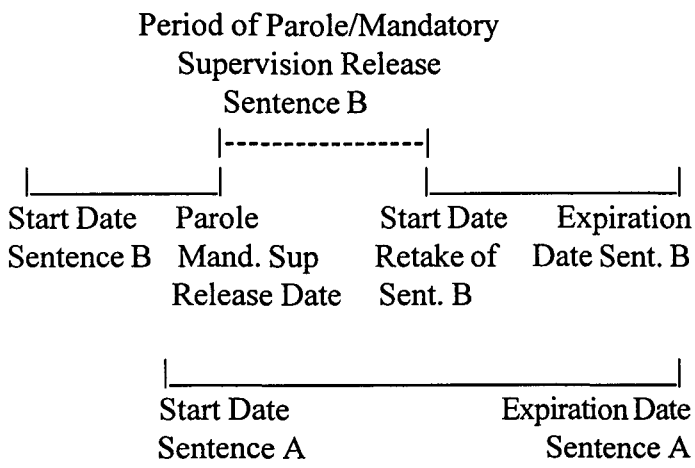
c. ensure that specific claims of overlapping concurrent sentences by or on behalf of inmates are reviewed to assure that the sentences are calculated consistent with this DCIB; and

d. ensure that the sentences of all inmates returned to custody from escape, parole, mandatory supervision, or other out-of-custody status are reviewed, and to the extent necessary, recalculated under this DCIB.

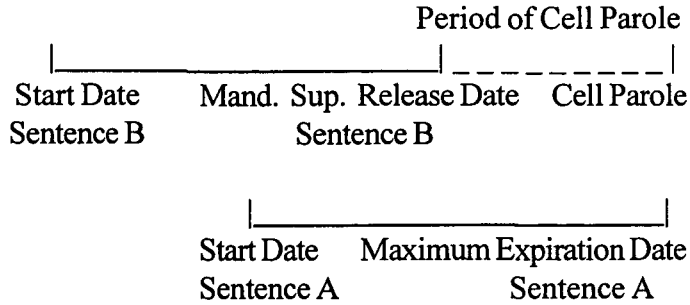
5. In the event there are any questions about this procedure, or concerns about possible exceptions to the procedure, they should be referred to Warren Sparrow, Chief of Classification.



Often, such an "overlapping consecutive/concurrent" sentence is caused by a break in custody due to a release on parole or mandatory supervision from an original sentence, followed by a new sentence and subsequent revocation of parole or mandatory supervision on the original sentence. Such an "overlapping consecutive/concurrent" sentence may be graphically illustrated as follows:



Prior to 1990, the DOC applied diminution of confinement credits to individual sentences so that a prisoner with an "overlapping consecutive/concurrent" sentence would be "released" to "cell parole" on sentence B, but would remain to complete service of sentence A. That may be graphically illustrated as follows:



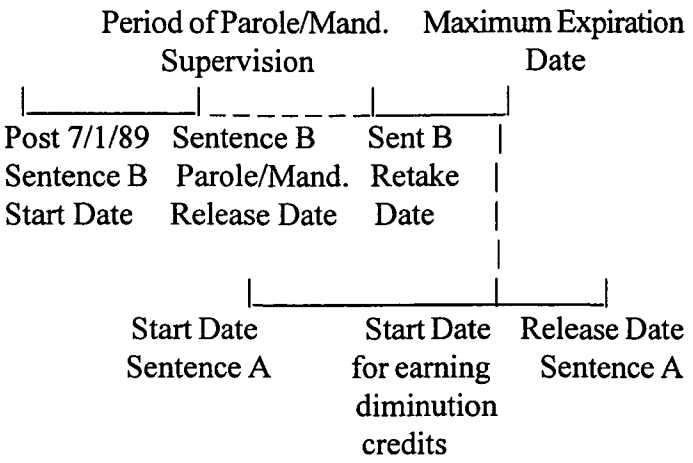
In response to prisoner litigation, the DOC reevaluated its practices in regard to "overlapping consecutive/concurrent" sentences and "cell parole" and on March 6, 1990, issued Division of Correction Information Bulletin ("DCIB") 9-90, which directed the DOC's commitment clerks to apply diminution of confinement credits to the maximum expiration date farthest in the future. DCIB 9-90 abolished the practice of "cell parole" and inmates received the benefit of all diminution of confinement credits awarded or earned while in prison. Subsequent to the abolishment of "cell parole," inmates no longer lost the benefit of diminution credits earned on the earlier sentence and received earlier mandatory supervision release dates and earlier releases from incarceration. However, the DOC still maintained the view that a combination of sentences for eligible and ineligible offenses in an "overlapping consecutive/concurrent" sentence structure rendered the prisoner completely ineligible for special project diminution credits for the entire period of incarceration.

Pursuant to Article 41, section 4-612(f), the DOC determined that a prisoner could not earn any diminution of confinement credits on a subsequent "overlapping consecutive/concurrent" sentence until the prisoner reached the maximum expiration date of the prior revocation of mandatory release sentence.[112] These cases became known as "max to max" cases, as good conduct credit on the subsequent sentence was only awarded from the maximum expiration date of the prior sentence to the maximum expiration date of the subsequent sentence, rather

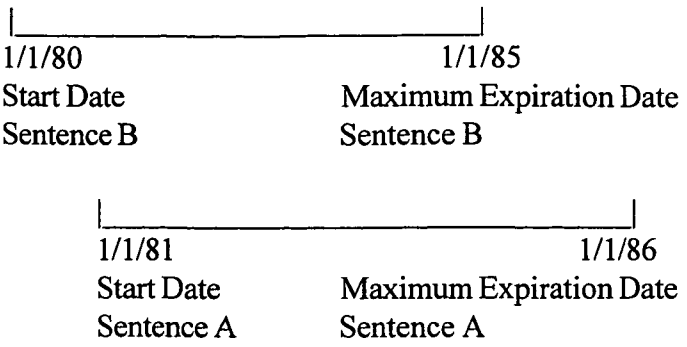
[111] For the purpose of consistency, if not logic, in sentence illustrations and hypotheticals, the author has used the DOC's sentence identification style of identifying the first sentence as Sentence "B" for "Before" and the second sentence as Sentence "A" for "After." (The author is unable to attribute the praise for this bit of nomenclature to any individual in the DOC, so the DOC as a whole is the recipient of such praise.)

[112] MD. ANN. CODE art. 41, § 4-612(f) provides: "A person under mandatory supervision may not earn any new diminution credits once the mandatory supervision has been revoked."

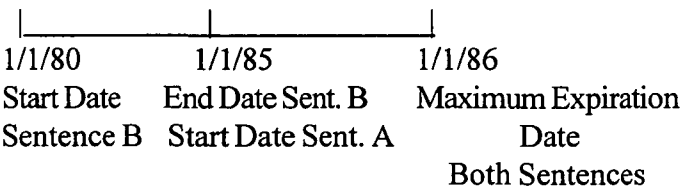
than from the date of commitment on the subsequent sentence to the maximum expiration date of that subsequent sentence. This may be illustrated as follows:



Consider the following example.[113] On January 1, 1980, John Doe is committed to the custody of the Commissioner of Correction for a sentence of five years. For the sake of simplicity, let us eliminate pretrial credit under Article 27, section 638C, and posit that the sentence also commences on January 1, 1980. The maximum expiration date is therefore January 1, 1985. On January 1, 1981, Doe is again committed to the custody of the Commissioner of Correction for a sentence of five years, commencing January 1, 1981. The new maximum expiration date is now January 1, 1986. The total obligation to the DOC is six years. The sentence structure may be graphically illustrated as follows:



On January 1, 1980, Mike Roe is committed to the custody of the Commissioner of Correction for a sentence of five years, commencing January 1, 1980. On January 1, 1981, Roe is sentenced to one year, to be served consecutively. Roe's maximum expiration date is January 1, 1986. Roe's total obligation is six years. The sentence structure may be graphically illustrated as follows:



Based upon the preceding hypothetical, prior to March 6, 1990, the official effective date of DCIB 9-90, Doe's and Roe's sentences could have been calculated as follows:

(1) Roe would have been released to mandatory supervision on or about April 22, 1984, having received the benefit of 360 good conduct credits and approximately 259 industrial credits;

(2) Doe would have been "released" to "cell parole" on his "B" sentence on or about August 4, 1983, having been awarded 300 good conduct credits on that sentence and having earned approximately 216 industrial credits;

(3) Doe would have remained incarcerated to complete the service of the "A" sentence and would not have actually been released from incarceration until on or about December 15, 1984. At this point he has been awarded 300 good conduct credits on his second sentence but has only received the benefit of 82 industrial credits earned between the date of his "cell parole" and his actual mandatory supervision release date.

[113] The following assumptions apply to this hypothetical: (1) all four convictions are for the same offense; (2) there are no forfeitures for violating prison disciplinary rules (*See* MD. ANN. CODE art. 27, § 700(g)); (3) neither prisoner makes parole; (4) each prisoner gets 120 diminution of confinement credits per year of incarceration (60 good conduct credit and 60 industrial credits with the good conduct credits given in a "lump sum" at entry into the DOC and the industrial credits being earned on a month by month basis at a rate of five days per month of incarceration).

Let us assume that prior to April 22, 1984, under the hypothetical set forth above, Doe and Roe shared the same cell and worked side-by-side in the same prison kitchen for their five industrial credits per month. On April 22, 1984, Doe sees his cell mate, who was convicted of the same offenses and received the same time to serve, go home, while Doe stays in prison for another eight months. As a result of that inequity, prisoners in Doe's situation filed suit and sought relief. In response to these cases, the DOC promulgated DCIB 9-90, which officially became effective on March 6, 1990. For the first time, DOC commitment staff were directed to apply diminution credits against the entire term of confinement. At the request of the Department of Public Safety and Correctional Services, the General Assembly subsequently amended Article 27, section 700, to add a definition of "term of confinement" that comported with the application of credits called for by DCIB 9-90.[114]

The legislative history of the 1991 amendment to Article 27, section 700 shows that the DOC's current view of sentences is that of separate terms of confinement for the purpose of applying the benefit of diminution credits.[115] This view is contrary to the intent of the General Assembly and is violative of the guarantee of equal protection of the laws. The amendment originated as House Bill 174.[116] The Department of Public Safety and Correctional Services filed a bill entitled "Position on Proposed Legislation."[117] That document reads that the amendment in question, concerning the definition of "term of confinement,"[118] would:

> [m]ake it clear, consistent with Division [of Correction] practice and view of current law [*i.e.*, the view contained in DCIB 9-90], that diminution of confinement credits are applied across the entire term of confinement an inmate is serving, as opposed to being applied to the individual sentences that make up that term. *The result is that an inmate with a combination of consecutive and concurrent sentences is awarded good conduct credits in the same manner as an inmate who must serve the same amount of time, but based upon a single sentence.* This is consistent with the manner in which the Maryland Parole Commission, under law, treats the sentences to which an inmate is subject when parole is granted.[119]

In the wake of *Wickes*, the DOC returned to "cell parole" for those prisoners with sentences separated by a break in custody as a result of reincarceration after release to either mandatory supervision or parole.[120] It should be noted that the amendment to Article 27, section 700, was as a result of the DOC's request to codify DCIB 9-90, and that the DOC was interpreting that amendment to Article 27, section 700, in such a way as to recreate the equal protection problem DCIB 9-90 was designed to cure. The equal protection problems presented by the DOC's approach may be illustrated by another hypothetical.

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[114] *See* 1991 Md. Laws, ch. 354.

[115] *See id.*

[116] *See id.*

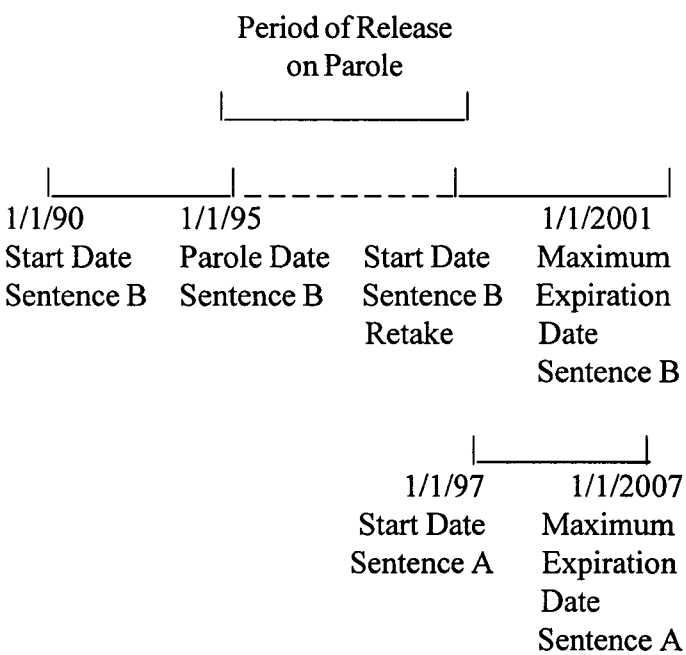
[117] *See id.*

[118] Prior to July 1, 1991, the effective date of the amendment, MD. ANN. CODE art. 27, §700, provided for deductions, "...within the period between the first day of commitment to the custody of the Commissioner and the last day of the inmate's maximum term of confinement," but did not define, "term of confinement." MD. ANN. CODE art. 27, § 700 (1987 Repl. Vol.).

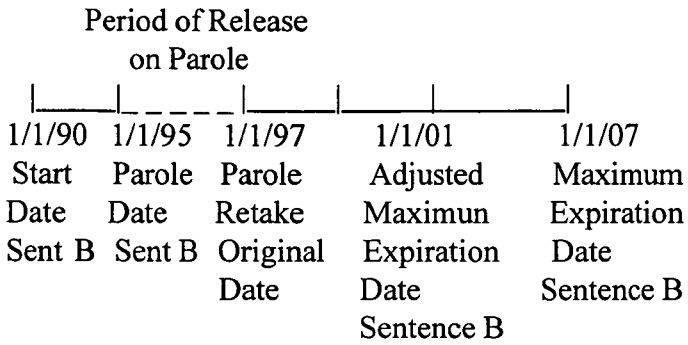
[119] 1991 Md. Laws, ch. 354 (emphasis added). A review of the H.B. 174 file reveals that the particular amendment to the definition of term of confinement was approved with little or no controversy. It appears that another amendment that took effect in 1991 and prohibited the award of diminution of confinement credits to prisoners serving Maryland sentences in foreign jurisdictions occupied more committee attention and comment from both the Legal Aid Bureau and the Office of the Attorney General.

[120] While the breaks in custody in both *Fields* and *Wickes* were caused by mandatory supervision releases, there appears to be no logical distinction between parole and release to mandatory supervision under these circumstances. It is unknown in its post-*Wickes* calculations how the DOC would treat a break in confinement due to an escape.

On January 1, 1990, John Doe is sentenced to ten years in the DOC, commencing on January 1, 1990, with a maximum expiration date of January 1, 2000. Doe is granted parole effective on January 1, 1995. Doe remains free from DOC custody for two years. On January 1, 1997, Doe receives a sentence of ten years, commencing January 1, 1997, running concurrent with the prior sentence and resulting in an adjusted maximum expiration date of January 1, 2007 for Sentence A. Parole is revoked. He owes the DOC two years for time out of custody. Doe is allowed one year credit for "street" time.[121] He owes the DOC one year, which is added to the end of his first sentence, but which does not affect his maximum expiration date to give him an adjusted maximum expiration date of January 1, 2001 for Sentence B. Doe's obligation may be graphically illustrated as follows:



On January 1, 1990, Jane Roe is sentenced to ten years in the DOC, to commence on January 1, 1990, with a maximum expiration date of January 1, 2000. Roe is granted parole effective on January 1, 1995, and is free from DOC custody for two years. Parole is revoked on December 1, 1997, and Roe is allowed one year "street" time. Roe owes the DOC one year which is added to the end of that sentence to give Roe an adjusted maximum expiration date of January 1, 2001. On January 1, 1997, Roe is sentenced to six years in the DOC, to be served consecutively to the parole violator sentence.[122] Roe's obligation is graphically illustrated as follows:



The total obligation to the DOC in both cases is exactly the same. However, in the post-*Wickes* world of diminution of confinement credits, at least in the DOC's view of that world, Roe receives the benefit of all credits awarded or earned during the entire period of incarceration, while Doe will have to "mandatory out" on the balance of Sentence B and then start all over again on the Sentence A.[123] Again, assuming credit at a rate of 120 days per year (60 days per year for good conduct credit awarded in a lump sum at the start of each incarceration and five days a month industrial credits earned and applied on a month to month basis) and no forfeitures of good conduct credit for violating prison disciplinary rules, Doe will be released to mandatory supervision on or about May 14, 2004, while Roe will be released to mandatory supervision on or about September 24, 2002, a difference of roughly 20 months.

[121] *See* MD. ANN CODE art. 41, § 4-511(d)(1).

[122] Under the DOC's interpretation of MD. ANN. CODE art. 27, § 690C (1996), parole must first be revoked for a sentence to be run consecutively to a term imposed for a parole violation. If, as in most cases, parole is not revoked until after a new sentence is imposed, and even though the sentencing judge may have specified that the sentence was to be served consecutively to the parole violation sentence, the DOC treats the new sentence as starting on the date of its imposition and thus is either an "underlapping" sentence or an "overlapping concurrent/consecutive" sentence.

[123] 1996 Md. Laws, ch. 567, added a prohibition to MD. ANN. CODE art. 27, § 700(k) which prevents a parole violator from receiving the benefit of credits earned prior to release on parole. This provision could not be applied to either prisoner without violation of *ex post facto* principles.

b. Getting "*Wickes*'ed"

Representatives from the DOC testified before the Maryland General Assembly that the cell parole theory of sentence calculation was too cumbersome and unfair in its application. Moreover, the DOC also testified that it was incapable of recalculating all those sentences in regard to the double good conduct credits. However, the DOC's reaction to *Wickes* was to recalculate all of the prisoners sentences. For those individuals who had been released based upon a overlapping consecutive/concurrent sentence calculation but which would not have been released at that time under a cell parole sentence calculation, the DOC issued administrative escape warrants[124] for approximately 160 prisoners.[125]

3. *Henderson*

Vincent Henderson was released from the DOC to MSR on July 7, 1997.[126] On May 5, 1998, after 10 months of infraction free mandatory supervision release, Henderson was "*Wickes*'ed" under the authority of an administrative retake warrant charging escape.[127] After retaining Henderson in custody for several days, Henderson was released on May 14, 1998 pursuant to habeas corpus relief granted by the Circuit Court for Baltimore City on the grounds that the DOC had violated Henderson's due process rights.[128] Some short time after Henderson was released, the DOC released those other prisoners which had been "*Wickes*'ed" back into custody, but still maintained that the DOC had acted properly in retaking the prisoners.[129] On May 18, 1998, the DOC appealed the decision to the Court of Special Appeals of Maryland and at the same time petitioned the Court of Appeals of Maryland for issuance of a writ of certiorari.[130] The court granted the petition and the matter proceeded on an expedited basis with arguments held only three weeks later on June 6, 1998.[131]

The case was of obvious importance to Henderson, but the system-wide impact was more significant. The DOC was forced to finally admit that their twist on the *Wickes* decision impacted some 2000 prisoners and thus resolving the difficulties created for that large prisoner population was imperative.[132]

On appeal, the DOC took the position that its post-*Wickes* policies were a correction of its prior erroneous construction of Article 27, section 700, which had been corrected by *Wickes*.[133] The DOC further argued that Henderson's due process rights were not violated because

[124] These were not judicially issued arrest warrants, but rather administrative escape retake warrants issued by the Parole Commission.

[125] Administrative escape retake warrants were issued for 111 individuals, and an additional 13 warrants were issued for individuals who had been erroneously released but also had parole violations pending.

[126] *See* Henderson, 351 Md. 438, 447, 718 A.2d. 1150, 1155 (1998).

[127] *See id.* at 447-48, 718 A.2d. at 1155. Approximately 50 individuals were physically returned to the DOC pursuant to an administrative escape retake warrant.

[128] *See id.* at 449, 718 A.2d at 1156.

[129] *See id.* at 450, 718 at 1156. At oral argument before the court of appeals on *Henderson*, the court was prompted to ask the DOC, if the court of appeals ruled in their favor, would the DOC retake all effected prisoners, hold them just long enough for them to lose their employment, housing, and means of transportation, and then release them.

[130] *See id.*

[131] Henderson argued for affirmation of the trial court on ex post facto principles of state and federal constitutional grounds and his counsel, Ralph S. Tyler, formerly Deputy Attorney General of Maryland and now a partner in the Baltimore office of Hogan & Hartson, LLC, vehemently objected to PRISM's entry into the case as *amicus curiae* on behalf of the general prison population. Tyler was concerned that the general prison population's arguments could adversely affect or detract from his argument on behalf of his one client.

PRISM took the position that the problem, while systematic, was not constitutional in nature. PRISM recognized the sweeping effect the DOC's interpretation had on the prison population and the systemic interests in resolving the issue for the entire prison population to avoid delay and overcrowding of the court docket. The court of appeals agreed and permitted PRISM to brief and argue as *amicus curiae* on behalf of the prisoners on several grounds, including the need to amend *Wickes*.

In rendering its decision in *Wickes*, the court of appeals understandably did not appreciate how the dicta in that case would be used by the DOC to make mischief. The court ultimately adopted the prisoners' position and revised the *Wickes* decision rather than reaching any constitutional issues, thus resolving not only Henderson's problem, but the dilemma that faced all similarly situated prisoners.

[132] *See supra* note 108.

[133] *See* Henderson, 351 Md. at 451, 718 A.2d. at 1156.

the DOC's policy pursuant to *Wickes* was a foreseeable result and he was not required to serve any more time than required under the law.[134]

Henderson argued that the *Wickes* decision constituted a new ruled the DOC's retroactive application of *Wickes* was arbitrary and capricious.[135] Henderson also raised two constitutional arguments. First, that the retroactive application of *Wickes* violated the federal and state constitutional prohibition against *ex post facto* laws, and, second, that it violated substantive due process.[136]

As *amicus curiae*, PRISM argued for the prisoner class that the DOC's interpretation of *Wickes* violated federal and state equal protection principles and the clear intent of the statute.[137] Accordingly, the court needed to clarify its decision in *Wickes* to ensure that prisoners received the full benefit of their earned diminution credits.[138] Finally, *Wickes* should be applied retroactively to the prisoners benefited by the decision.[139]

Judge Wilner authored the Henderson decision for a divided court.[140] That decision held that Judge Chasanow's decision in Wickes went beyond what was necessary to render a decision in that case and it was that additional language, argued by the prisoners to be dicta,[141] that had caused the mischief that prompted the Fields litigation.

While there was no true *mea culpa*, the court of appeals did acknowledge the misstep of *Wickes* and heeded the *amicus curiae's* call to clarify *Wickes*, bringing an end, for now, to the long running credits controversy. In so doing, the court concluded that the rule of lenity alone would have dictated the same result in *Wickes* and *Fields* without any need to go further.[142] Additionally, had the ruling been confined to those instances where strict application of the section 700 definition of "term of confinement" deprived some inmates of the benefit of the 1992 law, there would have been no confusion.[143] But, no. The court entered a ruling that envinicated a broader definition of "term of confinement" which does not aggregate sentences imposed before and after mandatory supervision release. The court held that "[t]he sole basis of the Division's recalculation of Henderson's good conduct credits was the language we used in Wickes ... That and that alone, is what led the Division to redetermine the mandatory supervision release dates of some 2,000 inmates."[142]

The majority recognized that the expanded holding of *Wickes* resulting in a restricted application of Article 27, section 700, "was not necessary in order to reach the result in *Wickes*."[143] The court clarified the rule regarding aggregation, stating, "[a]pplication of the statutory direction to aggregated the sentences produces no ambiguity in this instance; it does not deprive Mr. Henderson or others similarly situated of any legislatively created benefit."[144]

Most significant in the majority opinion was the court's recognition of the nuances inherent in Maryland's diminution of confinement scheme. Concluding the court's opinion, Judge Wilner opined:

> These three cases -- *Fields*, *Wickes*, and *Henderson* -- illustrate the different ways in which a statute such as Ch. 588 can affect inmates in our correctional system. In *Fields* and *Wickes*, we were dealing with one context and did not need, or really intend, to go beyond it. In articulating a secondary justification for our holding in *Wickes*, we inadvertently led the Division to a conclusion that was both unintended and erroneous. *Fields* and *Wickes* remain good law, based on the ambiguity created in the circumstances of those cases and

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[134] *See id.* at 447-49, 718 A.2d at 1155.

[135] *See id.* at 448, 718 A.2d at 1155.

[136] *See id.*

[137] *See Amicus curiae* brief for PRISM at 9, Henderson (No. 39-1998).

[138] *See id.* at 20.

[139] *See id.* at 24.

[140] The opinion was written by Wilner, J., and joined by Eldridge, Raker and Cathell, JJ. Chasanow, J., author of *Frost, Fields* and *Wickes*, filed a heated dissent and was joined by Bell, C.J., and Rodowsky, J.

[141] During oral argument there was a respectful but spirited debate between prisoners' counsel and Judge Chasanow as to whether or not that language was in fact dicta. Judge Chasanow maintained at oral argument and later in his dissent that the language did indeed set forth the law of the case.

[142] *See* Henderson, 351 Md. at 451-52, 718 A.2d at 1157.

[143] *See id.* at 452, 718 A.2d at 1157.

[144] *Id.* at 451, 718 A.2d at 1157.

its resolution through application of the rule of lenity. That rule does not require a departure from the statutory direction in § 700 when, as here, there is no ambiguity.[145]

In *Fields* and *Wickes,* the court adopted unanimous positions. When it came to *Henderson* and the interpretation of *Wickes*, the court divided 4-3. The stinging tone of the minority decision illustrates just how seriously divided the court was on this question.

> The majority's opinion is consistent with *Fields* and *Wickes* in its explanation of the history of § 700 and the interpretation of that statute as applied in *Fields* and *Wickes*. The majority strains to manufacture a way to make the *Fields* and *Wickes* decisions inapplicable to recidivists who commit violent crimes on parole in order to let those violent recidivists out earlier than our express language in the *Wickes* decision would allow. I do not believe this inconsistent construction that benefits violent multiple offenders was the intent of the legislature, and I know it is contrary to the express language of *Wickes* and was neither the intent of the author of the *Fields* and *Wickes* opinions nor at least two additional members of the Court.[146]

III. CONCLUSION

Prisoners' litigation is not a pursuit which carries public favor, especially in regard to matters concerning early release from incarceration. It is popular to say that, "If a person is sentenced to five years, he should serve five years." But that is not really the issue in the series of cases which have been discussed in this article. Even the most ardent proponent of incarceration would not agree that, "If a person is sentenced to five years, he should serve seven years."

The Rule of Lenity is a long standing general principle of law by which any discretion in imposition or calculation of sentence is resolved in favor of the prisoner. For some reason, the DOC moved away from that rule a few years ago, and began the policies which have resulted in the litigation which is the subject of this article.[147] The prisoners have described the DOC's conduct in this regard as the Rule of Dislenity, whereby any discrepancy in sentence calculation is resolved to the prisoners' detriment. So far the Rule of Lenity has prevailed,[148] although in the guise of esoteric and arcane statutory interpretation. Most assuredly there will be legislation which addresses the effect of this series of decisions. That legislation will most probably be aimed at closing a loophole and eliminating any discrepancy which might invoke the Rule of Lenity. The reader may judge for themselves what course the DOC and the prisoners will pursue at that time.[149]

About the Authors: David C. Wright graduated with a Bachelor of Arts in History from Washington College in 1979 and received his *Juris Doctor* in 1982 from Delaware Law School of Widner University. He is currently the Executive Director of PRISM, Inc.

Stephen Z. Meehan also received his Bachelor of Arts from Washington College, in 1989. He received his *Juris Doctor* from the University of Baltimore School of Law. Mr. Meehan is Principal Counsel for PRISM, Inc.

Joseph B. Tetrault received his Bachelor of Arts from St. John's College in 1984 and his *Juris Doctor* from the University of Maryland School of Law in 1989. He is currently Chief Staff Counsel for PRISM, Inc.

[145] *Id.*

[146] *Id.* at 452, 718 A.2d at 1157, (The reader should also note, that while not explicitly stating the same, the *Henderson* Court found the language which was at issue in *Wickes* to indeed be dicta.)

[147] *Id.* at 453, 718 A.2d at 1158.

[148] *Id.* at 455-56, 718 A.2d at 1159 (Chasanow, J. dissenting).

[149] This move occurred roughly contemporaneously with the revelation that John Thanos may have been released prior to his correctly calculated release date. The reader will note that Thanos was executed for murders which occurred after his actual release, but prior to what could be argued to be his correctly calculated release date.

[150] Additionally, while *Fields, Sayko, Hood,* and *Wickes* were victories for the prisoner, *Henderson* may fairly be called only a retrospective victory.

[151] Currently pending before the Court of Appeals is *Lomax v. Warden,* No. 45, Sept. Term 1998, in which prisoners are challenging the Governor's policy of no parole for parolable life sentences.